No. 92-1402

In The

Supreme Court of the United States

October Term, 1992

C & A CARBONE, INC., RECYCLING PRODUCTS OF ROCKLAND, INC. and ANGELO CARBONE,

Petitioners,

vs.

TOWN OF CLARKSTOWN,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department

RESPONDENT'S BRIEF IN OPPOSITION

RICHARD A. GLICKEL
Counsel of Record
Two Crosfield Avenue, Suite 108
West Nyack, New York 10994
(914) 353-4300

MURRAY N. JACOBSON
Clarkstown Town Attorney
10 Maple Avenue
New City, New York 10956

Attorneys for Respondent

QUESTIONS PRESENTED

1. Does this case warrant further judicial review?

2. May petitioners invoke the dormant Commerce Clause to avoid local regulation of their decidely local enterprises?

LIST OF ALL PARTIES

In addition to those parties whose names appear in the caption of the case, defendants below identified as "John Doe 1 through 6" were believed to be certain individuals and entities including Carmine and Salvatore Franco, James Ribudo, Northeastern Recycling Co., Anchor Carting Co. and Sal-Car Transfer Systems, Inc. R. 117-119.[1]

1. Because respondent obtained judgment *sans* discovery in the underlying lawsuit, the correct identity of the "John Doe" defendants remains unresolved.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases Cited:

Page

Statutes Cited:

Contents

No. 92-1402

In The

Supreme Court of the United States

October Term, 1992

C & A CARBONE, INC., RECYCLING PRODUCTS OF ROCKLAND, INC. and ANGELO CARBONE,

Petitioners,

vs.

TOWN OF CLARKSTOWN,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The unanimous decision of the Supreme Court of the State of New York, Appellate Division, Second Department (Harwood, J.) dated August 31, 1992 is reported at 182 A.D. 2d 213 and 587 N.Y.S. 2d 681. Pet. App. 1a-15a. The decision of New York's Court of Appeals denying petitioners' motion for leave to appeal dated

October 27, 1992 is reported at 80 N.Y. 2d 760, 605 N.E. 2d 874 and 591 N.Y.S. 2d 138. Pet. App. at 47a. The unreported decisions and order of the Supreme Court of the State of New York for the County of Rockland, wherein respondent's action originated, dated July 15, 1991 and September 16, 1991 are reproduced at Pet. App. 22a-33a and 16a-21a, respectively and that court's judgment as entered on July 31, 1991 is set forth in the record at R. 22-24.

The memorandum and order of the United States District Court (S.D.N.Y.), while included in the record as one of petitioners' exhibits upon their motion for rehearing and/or reargument, (R. 313-330, Pet. App. 34a-46a), was not subject to the Appellate Division's review nor was it delivered in the case which this Court is being asked to review.[2]

STATEMENT OF JURISDICTION

Petitioners seek to invoke this Court's jurisdiction under 28 U.S.C. § 1257(a). New York State's highest court declined to hear their appeal on October 27, 1992. Pet. App. 47a. Respondent questions the Supreme Court's jurisdiction at I, *infra.* Respondent's time to file its brief in opposition to the petition was extended to and including April 30, 1993 by the Clerk of the Court in accordance with Rule 30.4.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case involves the Commerce Clause of the United States Constitution (U.S. Const., art. I, § 8, cl. 3) and §§ 248-3 & 5 of the Clarkstown Code (Local Laws, 1990, No. 9 of the Town of Clarkstown). Pet. App. at 48a-54a.

---

2. The District Court's opinion was not delivered in *this* case [Rule 14.1(d)] and petitioners' parallel action was dismissed on August 6, 1991, R. 372; Petition for Certiorari (hereinafter, Petition) at p. 7.

This case does *not* draw into question the constitutionality of New York's Holland-Gromack law, the after-enacted enabling legislation, which became effective July 23, 1991 (*see* L. 1991, c. 569). Petitioners not only failed to challenge the validity of the confirmatory statute upon their state court appeal, but they had earlier misconstrued the enactment by asserting what they perceived as its preemptive effect upon respondent's local law in reargument. Pet. App. 14a and 17a; R. 373-379.[3]

STATEMENT OF THE CASE

The facts are essentially as found below. Pet. App. 1a-7a; 22a-31a. Respondent obtained a permanent injunction against petitioners' continued violation of its zoning ordinance and local law requiring that all acceptable solid waste originating or brought within Clarkstown be delivered to respondent's transfer station for shipment to out-of-state disposal facilities. Pet. App. 7a, 30a, 32a, 43a; R. 22-24, 82, 94, 99, 101.[4]

Faced with the state-ordered closure of its sanitary landfill,

---

3. Nor was the statute questioned within petitioners' short-lived federal action. It is submitted that petitioners' reference to 28 U.S.C. § 2403(b) is misplaced (*see* Petition, fn. 1 at p. 2).

4. A transfer station is simply a facility used for consolidating waste collected from various sources for transport to disposal sites (*see Harvey & Harvey v. Delaware Solid Waste Authority*, 600 F. Supp. 1369, 1371 (D. Del. 1985); those disposal sites in most instances are landfills [*see Government Suppliers Consolidating Serv. v. Bayh*, 753 F. Supp. 739 (S.D. Ind. 1990)]; one of the principal functions of the transfer station is the compacting of trash to allow its efficient long-distance transport to landfills, waste-to-energy plants and other final disposal facilities, in performing this function the transfer stations is not in competition with out-of-state final disposal facilities (*i.e.*, landfills, etc.), but, rather, *is their customer* [*see J. Filiberto Sanitation v. Dept. of Envir. Prot.*, 857 F.2d 913, 921 (3rd Cir. 1988)].

respondent received bids for the construction and operation of a municipal solid waste transfer station located at the landfill site to accommodate the daily flow of refuse generated by the Town's residents and the residents of neighboring Orangetown, New York, intended ultimately to form a part of a comprehensive county solid waste management plan. R. 169-173, 240-241. In contemplation of the new facility, the Town's zoning ordinance (Clarkstown Code, chapter 106) was amended in 1989 to exclude therefrom "transfer stations" as a permitted use anywhere within the Town. Pet. App. 8a.

In 1987 the New York State Department of Environmental Conservation ("DEC") issued permit number 4429 to C & A Carbone, Inc., authorizing the operation of a solid waste transfer station at petitioners' premises in West Nyack, New York. R. 160-162; Pet. App. 13a.[5] While they have variously referred to themselves as "recyclers" only[6] (Pet. App. 7a; R. 81-82),

---

5. New York's regulations define "*Transfer Station*," as a solid waste management facility, other than a recyclables handling and recovery facility exclusively handling non-putrescible recyclables, that can have a combination of structures, machinery, or devices, where solid waste is taken from collection vehicles and placed in other transportation units for movement to another solid waste management facility. [6 New York Code Rules and Regulations ("NYCRR") § 360-1.2 (a)(157)].

A "*Disposal Facility*", on the other hand, is defined as a solid waste management facility, or part of one, at which solid waste is intentionally placed into or on any land or water, and at which solid waste will remain after closure [6 N.Y.C.R.R.§ 360-1.2 (a)(45)].

6. Petitioners have, for some time, eschewed reference to the term that properly described their operation, *i.e.*, "*transfer station*" (*see however*, R. 160) and represented to respondent's town board that they did not wish to be a transfer station, that same was no longer permitted by respondent's zoning ordinance and

(Cont'd)

petitioners also assert that they are respondent's sole competitor within the Town and the target of respondent's anti-competitive program (Pet. App. 14a, 37a-39a; R. 94, 97, 101, 103, 121, 332, 334); a position which was summarily rejected by the district court (S.D.N.Y., Brieant, C.J.) wherein petitioners unsuccessfully advanced their claims under the Sherman Antitrust and Clayton Acts. Pet. App. 39a; R. 320.

After correctly disposing of their antitrust claims (Pet. App. 37a-39a),[7] the district court proceeded to grant petitioners' application for preliminary relief, notwithstanding that the matter was at the time *sub judice* in the state court, while conceding respondent's continued regulation of "the disposal of garbage generated *within* the Town's territorial limits". Pet. App. 43a.[8]

(Cont'd)

that "*they were not in the business of bringing household or industrial garbage to [their] site*", R. 143-144, 157-158, 305. Petitioners did not challenge respondent's zoning ordinance in the courts below nor did they claim that their transfer station constituted a legal nonconforming use. Pet. App. 8a. Contrary to their assertion here (*see* Petition, fn.3, at p. 5), petitioners' facility has never been an "authorized" recycling center. Their DEC transfer station permit is expired (Pet. App. 13a) and their facility was *never* considered a materials recovery facility ("MRF") by the DEC while their permit was in effect. R. 160, 163, 166. By mid-1991, Recycling Products of Rockland, Inc., was cited by the DEC for "operating a solid waste management facility without a permit" (R. 385) and assessed penalties totaling $110,000.

7. *See City of Columbia, et al. v. Omni Outdoor Advertising, Inc.*, 499 U.S. ___, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985); *Hancock Industries v. Schaeffer*, 811 F.2d 225, 232-36 (3d Cir. 1987).

8. The federal preliminary injunction was unnecessary in any event as the parties had, early on, agreed in state court that respondent would not interfere with petitioners' extra-territorial business pending the final determination of the litigation. R. 46, 115.

Following the state court's judgment on the merits in favor of the respondent, petitioners were allowed to voluntarily withdraw from the federal court. R. 372.

Petitioners have never identified the alleged out-of-state source(s) of the waste handled at their facility, (Pet. App. 18a-19a, 26a, 31a), which would result in their naming violators of neighboring New Jersey's solid waste regulations[9] (Pet. App. 19a, 26a, 31a; R. 117-119), as well as those local carters who sought to avoid respondent's transfer station while retaining the benefit of the rate increases granted to them in recognition of the increased costs (*i.e.*, tipping fees) necessitated by the closure of the Town's sanitary landfill. Pet. App. 26a-27a; R. 49-50, 303-304. In the decisions below the lower court was constrained to mention petitioners' repeated failure to come forward and "lay bare their proof" in support of their otherwise conclusory statements concerning the nature of their alleged interstate business activities. Pet. App. 18a-19a, 26a, 31a.[10]

Petitioners have not previously intimated, as they now do, that

---

9. N.J. Stats. §§ 13-1E-1; 40:14B-1, *et seq.* Clarkstown is a municipality within the county of Rockland which borders with Bergen County, New Jersey. The Bergen transfer stations' 1991 tipping fee for municipal solid waste delivered to that facility was $125 per ton. By evading the mandatory delivery of trash to the New Jersey Authority's transfer stations, petitioners' New Jersey suppliers of solid waste would reap the higher rates paid by their customers (New Jersey residents) to have their trash rermoved while disposing of the "bootlegged" New Jersey waste at the much lower rate of an unauthorized facility. R. 117-118.

10. As mentioned above, petitioners offered no proof as to the origin of the waste handled at their facility or the ultimate destination thereof, so it should come as no surprise that there is little, if any, reference made by the courts below to their unsupported allegations. *See* Petition at p. 8.

they are "brokers" of municipal solid waste[11] (*see* petition at p. 4), which is characteristic of the amorphous traits they have exhibited throughout this litigation. Indeed petitioners have never articulated what, exactly, were those "burdens" imposed upon interstate commerce by respondent's local law. Thus, the district court could only imagine that the $11 differential between petitioners' purported tipping fee and the per ton charge at respondent's transfer station resulted in a "shifting" of the cost for local benefits upon out-of-state residents. Pet. App. 43a.

Permanently restraining their violation of Local Laws, 1990, No. 9 of the Town of Clarkstown, the lower court determined that petitioners had "failed to demonstrate" that respondent's local law had "any demonstrable effect whatsoever on the interstate flow of goods. *Exxon Corp. v. Governor of Maryland*, 437 U.S. at 126 n. 16". Pet. App. 30a. The court found no impact upon the *export* of waste noting that "Regardless of whether the waste is shipped from the Clarkstown transfer station or [petitioners'] facility, it is destined for out-of-state landfills". Pet. App. 30a. The court agreed with the Third Circuit's explanation that a "transfer station is not in competition with out-of-state landfills. . . it is their customer". Pet. App. 30a. *See J. Filiberto Sanitation v. Dept. of Envir. Prot.*, 857 F.2d 913, 919 (3rd Cir. 1988). The state court concluded that the economic injury petitioners alleged was

> . . . an injury suffered by the in-state

---

11. This new self-portrayal does not fit the petitioners at all. Seeing as *all* of the municipal solid waste delivered to respondent's transfer station is disposed of at out-of-state facilities, if petitioners were, in fact, "trash-brokers", they would be free to arrange for the export of trash from the Town's transfer station to other states by "facilitating contacts between the transfer station and independent truck drivers who haul waste". *Cf., Government Suppliers Consolidating Serv. v. Bayh*, 753 F. Supp. 739, 758 (S.D. Ind.), *aff'd*, 975 F.2d 1267, 1269 (7th Cir. 1992).

> [petitioners] not by out-of-state interests who are involved in interstate commerce.

Pet. App. 31a.

By judgment entered on July 31, 1991, petitioners were permanently enjoined "from operating their respective businesses or suffering and/or permitting such business operations at the premises owned by them, in violation of Clarkstown's Local Law No. 9 of 1990 and Chapter 106 of the Clarkstown Town Code at the premises located at 183 Western Highway, West Nyack, New York." R.23.

On reargument the lower court re-examined respondent's ordinance under the *Pike* test[12] with the same result. Pet. App. 19a-20a. In adhering to his original determination the court noted that, except for reference to the $11 per ton cost differential, petitioners had provided "very little information regarding the alleged burden . . . impose[d] on interstate commerce", and that petitioners had "*failed to demonstrate factually the extent to which their operation or the operation of out-of-state entities with whom they are doing business, are being affected by this Local Law.*" Pet. App. 19a-20a (emphasis supplied).

The Appellate Division noted that petitioners failed to challenge either, respondent's zoning ordinance (Pet. App. 8a) or the "Holland-Gromack" law, the state enabling statute which confirms respondent's local law. Pet. App. 14a; R. 374-375. In light of the expiration of their permit "to operate a transfer station", the state appellate court viewed as moot petitioners' claim that respondent's local law might have diminished or invalidated their "vested rights" thereto. Pet. App. 13a. Upon examination of their commerce clause argument, the Second Department obviously

12. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

granted petitioners the "benefit of the doubt" by assuming that even if the $11 difference had *any* effect on the interstate flow of solid waste, there existed no evidence that would suggest an impermissible burden on interstate commerce. Pet. App. 12a. In upholding the lower court's judgment the Appellate Division viewed petitioners' protest as one which was decidedly private, concluding that, in the final analysis, petitioners' challenge to respondent's local law formed a "singular complaint" that the enactment was harmful to petitioners' business. Pet. App. 14a.

On motion for leave to appeal petitioners, pointing to the defunct federal preliminary injunction,[13] claimed that the case presented questions which were "novel and of public importance" and that the Second Department's unanimous decision conflicted with an earlier Court of Appeals' decision. The Court of Appeals found no merit to petitioners' application and denied the motion. Pet. App. 47a.

Following the denial of their motion for leave to appeal to New York's Court of Appeals the present petition was filed.

REASONS FOR DENYING THE WRIT

Numerous reasons exist for this Court's denial of the requested writ including (1) that same would constitute an improper exercise of the Supreme Court's jurisdiction; (2) petitioners' failure in the record below to come forth and lay bare their proof; (3) the relative unimportance of this case from the

13. Petitioners were reminded by the Appellate Division during oral argument that the District Court's preliminary injunction was really no different in effect than the discretionary stay "pending appeal" of the lower court's judgment, which petitioners had been granted by the Appellate Division, and was no more determinative of the (commerce clause) question than the discretionary stay was conclusive on the merits of their appeal.

standpoint of the Supreme Court's discretionary review; and (4) petitioners' proffered authorities are not on point to the present case.

I.

THE SUPREME COURT HAS NO JURISDICTION TO HEAR THIS CASE.

It is well-settled that where a state court judgment rests on a state law ground, the Supreme Court has no jurisdiction to review the case. It is submitted that the decisions and judgment below rest on at least one "independent and adequate state ground", *i.e.*, the validity of respondent's zoning ordinance (Clarkstown Code, chapter 106) which excludes transfer stations (except for respondent's) as a permitted use within the Town. Petitioners failed to challenge the ordinance or to allege that their's was a pre-existing legal nonconforming use (*see* note 6, *supra*) and they are permanently enjoined by the decisions and judgment below from operating their business(es) in violation thereof. R. 23.

While respondent's Local Law No. 9 was subject to constitutional review in the state courts, respondent's zoning ordinance was not; nor was there a challenge below to the constitutionality of the state enabling statute *i.e.*, the "Holland-Gromack" law (*see* L. 1991, c. 569) which *confirms* respondent's "waste flow" legislation. Thus, no "federal question" has been framed concerning the validity of the state statute permitting respondent's local law and it is, of course, too late to do so here and the petition is, therefore, jurisdictionally defective.

II.

PETITIONERS FAILED TO PRESENT FACTS BELOW IN SUPPORT OF THEIR CHALLENGE TO RESPONDENT'S LOCAL LAW.

As Justice Cardozo long ago cautioned, "Many and insidious are the agencies by which the [Court's] opinion is poisoned at its sources. Courts have often been led into error in passing upon the validity of a statute, not from misunderstanding of the law, *but from misunderstanding of the facts*" (Cardozo, *The Nature of the Judicial Process*, Lecture II, "The Methods of History, Tradition and Sociology", pp. 80-81, Yale University Press, (emphasis supplied)[14].

The state courts noted petitioners' inability to demonstrate that respondent's regulation imposed any cognizable burden upon interstate commerce. Pet. App. 2a, 7a, 12a, 19a, 20a, 29a, 30a and 31a. Having failed heretofore to establish any factual basis for the judicial invalidation of respondents' local law, petitioners' current invention is purposely crafted to distract the reader from the inevitable realization that their application is meritless. Petitioners' suggestion (as raised by their question presented here) that respondent's local law serves to create a ban on the export of municipal solid waste without reference to the closure of the Town's landfill on December 31, 1990 (Pet. App. 3a), or that no other disposal facility (*see* fn. 5, *supra*) exists within the Town, would immediately bring to mind a suburban community awash in a sea of trash.

Located on the site of the Town's former municipal landfill is

---

14. So too is the admonition to opposing counsel contained in Rule 15(1) intended to obviate the circumstance whereby the Court is misled into granting review to inappropriate cases.

the respondent's Solid Waste Transfer Station which, by DEC definition, is the point from which all of the Town's trash is processed and shipped out-of-state to various landfills, waste-to-energy plants, salvagers, or other *final* disposal facilities in Connecticut, Massachusetts, Rhode Island, Illinois, New Jersey, West Virginia, South Carolina, Ohio, Indiana and Pennsylvania. The foregoing, of course, serves to dispel the notion that respondent's law operates as an export ban impermissibly burdening interstate commerce and establishes respondent's role as an active participant in interstate commerce. *See J. Filiberto Sanitation v. Dept. of Envir. Prot.*, 857 F.2d 913, 921 (3rd Cir. 1988) "[transfer] station is not in competition with out-of-state landfills . . . *the station is their customer*".

Petitioners remain unable to articulate how, or where, respondent's ordinance discriminates against interstate commerce. While they appear to challenge the ordinance here as to what they have termed an "export ban" upon the Town's trash, they continue to make reference to the $11 per ton tipping fee differential without so much as hinting at how that difference impacts out-of-state interests.[15] Of course, to do so now would necessitate the creation of heretofore non-existent facts. Pet. App. 18a-19a, 26a, 31a. But inasmuch as the *respondent* pays the out-of-state disposal facilities to which its solid waste is transported for that service and not vice

15. The $81 per ton "tipping fee" charged by respondent's transfer station is applied uniformly for all municipal solid waste without regard to origin or destination. In the Appellate Division petitioners argued that the $11 per ton price differential represented a "surcharge" against *their* business only. Petitioners never specifically alleged that the price difference had a possibly chilling effect upon, or otherwise served to slow, the in-flow of commerce nor that same possibly constituted a "shifting" of a local burden to out-of-state interests as the district court intimated . . . an argument which would have proven untenable given the New Jersey origin of their foreign municipal solid waste (*see* note 8, *supra*).

versa, the price differential has no effect at all upon the *export* of the Town's waste. The local law was not designed to "shelter" the respondent's transfer station "from out-of-state interests". *See* Petition at 15. Earlier, petitioners had claimed that *they* were respondent's only competitor. And, the petitioners cannot explain how the respondent's local law seeks to advance "the economic interests of the town's residents through restrictions on interstate commerce". Petition at 17. The "simple answer" to petitioners' argument remains that respondent's local law "does not discriminate against interstate commerce". Pet. App. 11a.

Coupled with petitioners' omission to identify respondent's facility as a transfer station, is the disguise of the genuine nature of their own in-town enterprise which included the receipt and transfer of municipal solid waste to and from their Clarkstown premises. Pet. App. 2a-3a. To be sure, petitioners operated a transfer station not only by statutory definition (*see* fn. 5, *supra*) and license (Pet. App. 3a, 13a; R. 160-162), but through their own artless admissions here (Petition at 4, 12, 15, 16 and 22) and below (R. 81-82, 89-91, 94, 97-98, 101-103, 310, 334, 336, and 346-347).[16]

The present application assumes the legitimacy of petitioners' enterprise, *i.e.* that they were not in violation of any state regulations or local ordinances, and ignores the petitioners' uncontroverted facilitation of the violation of New Jersey's waste flow regulations (Pet. App. 6a, 18a-19a, 26a, 31a; R. 117-119, 163, 382-385), the constitutionality of which, to date, remain unchallenged. N.J. Stats. § 13-1E-1 *et seq.* Any such assumption would be contrary to those facts found by the state courts upon the record below.

16. Petitioners' assertion (Pet. fn. 3, p. 5) that the lower courts did not consider petitioners' enterprise a transfer station is untrue (Pet. App. 8a, 13a). During oral argument of their state appeal, the Bench referred to the petitioners' business as a "transfer station".

Petitioners failed previously to come forward and lay bare their proof (Pet. App. 18a-19a, 26a, 31a), or to have, at least, presented facts in support of their "constitutional" argument, and their application must now fail for want of this most basic element.

III.

THIS CASE IS NOT SUFFICIENTLY IMPORTANT TO WARRANT FURTHER REVIEW.

Declaring this matter as one of "national importance" requiring this Court's guidance, petitioners' portrayal of respondent's local law as being illustrative of *all* currently existing flow control legislation (*see* Petition, fn. 4, p. 10) is essential to their entirely theoretical dissertation concerning the relative merits (or, more accurately, the lack thereof) of flow control.

The concept of "importance" in terms of this Court's discretionary review of a case relates to the importance of issues "to the public as distinguished from" importance to the "parties" themselves [*Layne & Bowler Corp. v. Western Well Works*, 261 U.S. at 393 (1923); *Rice v. Sioux City Cemetery*, 349 U.S. at 79 (1955)]. And the problem, though perceived as intrinsically important, must transcend "the academic or the episodic". (*Rice, supra*, 349 U.S. at 74).[17]

After carefully reviewing the record and all of the petitioners' contentions, the Appellate Division recognized that:

> In fact, what emerges from the appellants' multi-pronged challenge to Local Laws 1990, No. 9 of the Town of Clarkstown is a singular

17. Stern, Gressman and Shapiro, *Supreme Court Practice, 6th Ed.*, § 4.11, pp. 212-13.

> complaint that its enactment adversely affects competition in the solid waste industry.

(Pet. App. 13a).

The New York State Court of Appeals found no merit to petitioners' argument that their appeal presented questions that were either "novel or of public importance".[18] Similarly, a petition for a writ of certiorari to this Court will be granted only when there are special and important reasons therefor (*see* Rule 10).

Petitioners' creativity here cannot serve to transfigure a record otherwise bereft of any evidence in support of their challenge so as to elevate this case to the requisite status warranting this Court's review.

IV.

THE DECISIONS BELOW ARE NOT IN CONFLICT WITH OTHER AUTHORITY.

Petitioners claim that there exists a divergence in the "lower appellate courts" as to the commerce clause implications of restrictions on exports.[19] However, an unbiased review of the recent decisional law indicates consistent adherence to this Court's path [*see Government Suppliers Consolidating Serv. v. Bayh*, 975

18. The Rules of the New York State Court of Appeals require, in pertinent part: "500.11 Motions. (d) Permission to appeal in civil cases. The motion . . . shall contain . . . (v) A direct and concise argument showing why the questions presented merit review by this court, such as that they are novel or of public importance, or involve a conflict with prior decisions of this court, or there is conflict among the Appellate Divisions". (*See* 22 N.Y.C.R.R. § 500.11).

19. Petitioners did not advance their "export ban" argument to the courts below.

F.2d at 1277 (7th Cir. 1992), *aff'g*, 753 F. Supp. 739 (S.D. Ind.), applying *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, __ U.S. __, 112 S. Ct. 2019, 119 L. Ed. 2d 139; *Chemical Waste Management v. Hunt*, __ U.S. __, 112 S. Ct. 2009, 119 L. Ed. 2d 121 and *Philadelphia v. New Jersey*, 437 U.S. 617, in invalidating Indiana's statutory "backhaul ban"; *see also, Steven D. DeVito, Jr. Trucking v. Rhode Island Solid Waste Management Corp.*, 770 F. Supp. 775 (D.R.I. 1991), *aff'd*, 947 F.2d 1004 (1st Cir. 1991), granting a preliminary injunction against enforcement of a ban upon the out-of-state export of Rhode Island's solid waste by a Massachusetts hauler; *more recently, see Waste Systems Corp. v. County of Martin*, No. 92-1642 (8th Cir. Feb. 18, 1993), *aff'g*, 784 F. Supp. 641 (D. Minn. 1992), affirming the district court's permanent injunction against enforcement of a Minnesota ordinance which entirely forbid transport of waste out of counties located within Minnesota which had previously been disposed of at plaintiff's Iowa landfill].

Those recent decisions cited by the petitioners (*e.g., Waste Systems and DeVito*) which have dealt with attempted government restrictions upon the out-flow (*i.e.*, "export") of waste are *all* readily distinguishable from the present case because they each deal with the *final* disposal of waste (*i.e.*, at landfills, composting and waste-to-energy facilities) prohibiting its entry into interstate commerce. As the state courts recognized, respondent's transfer station is not a final disposal facility (*see* note 5, *supra*) and that *all* of the Town's solid waste re-enters the stream of interstate commerce following compaction and baling at the transfer station without impact upon out-of-state interests. Pet App. 30a.

Of course, the fact that respondent is not in competition with out-of-state concerns (*see J. Filiberto, supra*), in and of itself, does not guaranty the statute's validity. If respondent's local law, in some way, was discriminatory in its treatment of, effect upon, or represented a protectionist measure against out-of-state interests,

respondent would have to shoulder the task of justifying its burdensome regulations. *See Government Suppliers, supra*, 975 F.2d at 1278, *citing, Brimmer v. Rebman*, 138 U.S. 78, "as quoted by *Fort Gratiot*".

The Second Appellate Division's comments below are valid here too ". . . and the simple answer to [petitioners'] argument is that [respondent's local law] does not discriminate against interstate commerce (*citation omitted*) because, unlike the State or local legislation at issue in most of the cases on which the [petitioners] rely (*see e.g., Chemical Waste Management v. Hunt, supra; Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources, supra; Philadelphia v. New Jersey, supra; Dutchess Sanitation Serv. v. Town of Plattekill, supra*) the local law in issue here imposes no special fees, taxes prohibitions or duties on those transporting out-of-state articles of commerce. Rather, the local law applies evenhandedly to all solid waste processed within the Town, regardless of point of origin". Pet. App. 11a.

The Seventh Circuit has noted that "in these last decades of the twentieth century, environmental problems have produced heightened concerns about waste management, and garbage has become a frequent focal point of dormant commerce power jurisdiction (*Government Suppliers, supra*, 975 F.2d at 1277). Undoubtedly, garbage and problems inherent to its environmentally safe disposal will remain high on the list of priorities for local officials as we enter the next century.[20] But the present case would not, as petitioners' suggest, lend itself to the formation of a judicial definition of the parameters for municipal controls on the movement of solid waste or of regulating the nation's solid waste problems and plainly does not merit a grant of certiorari.

---

20. Wall St. J., Dec. 3, 1991, at 1.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

RICHARD A. GLICKEL
Counsel of Record
2 Crosfield Avenue, Suite 108
West Nyack, New York 10994
(914) 353-4300

MURRAY N. JACOBSON
Clarkstown Town Attorney
10 Maple Avenue
New City, New York 10956

Attorneys for Respondents